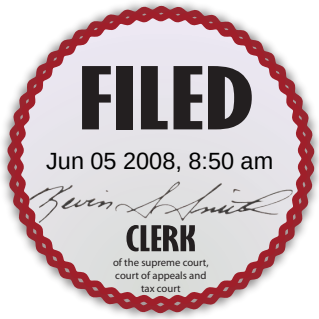

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IN THE
COURT OF APPEALS OF INDIANA

DONIELLE SHERLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 39A01-0712-CR-562
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JEFFERSON CIRCUIT COURT
The Honorable Ted R. Todd, Judge
Cause No. 39C01-0703-MR-50

June 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Donielle Sherley appeals the sentence imposed by the trial court after she pleaded guilty to one count of conspiracy to commit murder, a class A felony.

We affirm.

ISSUES

1. Whether the trial court abused its discretion by failing to recognize significant mitigating factors or by finding improper aggravating factors.

2. Whether the trial court abused its discretion when it ordered Sherley to pay restitution without having conducted an inquiry into her ability to pay.

FACTS[1]

In early January of 2007, Sherley and Ashley Robinson were roommates and close friends. Robinson had one child, a daughter, and Sherley had three children – twin five-year-old sons from her first marriage and a three-year-old daughter from her second marriage to Brandon Skinner. In February, Robinson's mother reported that she had been missing since early January.

On March 14, 2007, law enforcement officers conducted interviews with Sherley, her former husband Skinner, Brian Kemp, Michael Bowling, and Carissa Miller. On March 19, 2007, the State charged each of them with one count of murder and one count of conspiracy to commit murder, a class A felony. The information alleged that they did knowingly or intentionally kill Robinson by shooting her with a firearm, causing her

[1] In Sherley's plea agreement, she "specifically agree[d] to making a factual basis by way of question and answer through the State of Indiana." (App. 10). The CCS reflects that at the plea hearing on May 31, 2007, the factual basis for her plea was "established through testimony of defendant." (App. 4). Nevertheless, Sherley did not include the transcript of the guilty plea hearing as part of her appellate record.

death. It further alleged that they did, "with intent to commit the felony of Murder, agree to commit said felony of Murder," specifically "to knowingly kill" Robinson," and that the "overt act in furtherance of the agreement" was the "collect[ion]" and "deliver[y]" of Robinson to a predetermined location. (App. 7).

According to the probable cause affidavit, on January 7, 2007, in the presence of Kemp, Bowling, and Miller, Robinson and Sherley discussed their belief that Robinson had molested their daughter. Skinner expressed his intent to kill Robinson, and Kemp provided an unregistered gun to Skinner. Skinner instructed Sherley and Miller to go find Robinson and bring her to a specific area near the river.

As already noted, we do not have the benefit of Sherley's testimony that established the factual basis for her plea of guilty to conspiracy to commit murder. Thus, the record before us fails to reflect details of her participation in the crime. However, at the sentencing hearing, Sherley admitted that she and Miller went to get Robinson, and that Robinson would not have gone with Miller without Sherley because Miller and Robinson "hated each other[]." (Tr. 23). She further admitted that the trip entailed driving from Kemp's house through Madison to Robinson's residence. After picking up Robinson, the threesome stopped at Wal-Mart, where Sherley chatted with a friend, and bought chips and drinks. Sherley then drove them "all the way back to Hanover to" use Miller's car because she was almost out of gas; and then they took Robinson to the river area. (Tr. 27). Sherley conceded that despite her own testimony about being in fear of Skinner throughout this trip, she had maintained her composure. She further admitted

that she had numerous opportunities to do warn Robinson or to seek help from others or law enforcement, but she did not do so.

In its sentencing order, the trial court found – and Sherley does not challenge these facts – that after Sherley delivered Robinson to the river area, "Mr. Skinner shot Ms. Robinson once in the face at close range, then fired a second shot into her body at close range. Ashley Robinson's body was then dumped into the Ohio river." (App. 15). Further, "Robinson was pregnant at the time of the murder." *Id.*

The plea agreement provided that Sherley would plead guilty to conspiracy to commit murder, a class A felony, and the State would dismiss the murder charge. The plea agreement further provided that the trial court would determine her sentence, within the "range of twenty (20) to fifty (50) years, to be executed at the Indiana Department of Correction." (App. 9). On May 31, 2007, the trial court accepted Sherley's guilty plea.

On July 19, 2007, the trial court held the sentencing hearing. Sherley testified to her close relationship with Robinson. She also testified that she had suffered emotional and physical abuse from Skinner, and that her fear of him rendered her unable to warn Robinson or seek help. Robinson's sister and grandmother both testified about their loss, and that of Robinson's little girl, in her death and that of her three-month-old male fetus.

The trial court found three "aggravating factors to exist in this case." (App. 15). First, it found that the conspiracy to which Sherley pleaded "guilty resulted in a particularly cold-blooded and cruel murder," noting that Sherley had "actively participated in seeing that Ashley Robinson was taken to a place where others lay in wait to kill her." *Id.* Second, it found that the conspiracy "directly affected the victim's

family (especially the victim's own daughter)" when the murder conspiracy, "of which . . . Sherley was part," left them "not having either Ashley Robinson or her unborn son as part of their lives." *Id.* Third, the trial court found that Sherley had failed to take advantage of the "many opportunities to phone or even go to the police" before or even during her trip to pick up Robinson before taking her to the place of her execution; but, "rather than do so," Sherley had "continued to be a necessary and active participant in taking [Robinson] to her death." *Id.*

The trial court then found as mitigating circumstances Sherley's sincere expression of remorse; that her fear of Skinner might have rendered her less able to "do what most people like to believe they would have done under the circumstances"; that the event was unlikely to recur in Sherley's life; and that she had a very minimal criminal history. However, the trial court found the aggravating circumstances outweighed the mitigating circumstances, and imposed a sentence of thirty-five years. It suspended five years, subject to twelve specific probation conditions. The trial court further ordered that Sherley "pay restitution" of $18,175.30 to Robinson's family for the expenses of her death, as "a joint and several obligation" with her four co-defendants. (App. 17).

DECISION

1. Mitigating and Aggravating Factors

Sentencing decisions rest within the sound discretion of the trial court and are reviewed only on appeal for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007). So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion. *Id.* The trial court must enter a sentencing statement

when imposing sentence for a felony offense. *Id.* That statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence, including any findings of mitigating or aggravating circumstances which it finds "significant." *Id.* It would be an abuse of the trial court's discretion to enter

> a sentencing statement that explains reasons for imposing a sentence – including a finding of aggravating and mitigating factors if any – but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law.

Id.

Sherley first argues that the trial court abused its discretion when it failed to recognize and consider mitigating factors that she advanced to the trial court and that were supported by the record: (1) her guilty plea, and (2) that imposition of a lengthy sentence would result in an undue hardship to her children. We cannot agree.

Sensback v. State, 720 N.E.2d 1160, 1164 (Ind. 1999), noted that where "the State reaps a substantial benefit from the defendant's act of pleading guilty, the defendant deserves to have a substantial benefit returned." That said, it held that when the plea was obtained in exchange for the State's dismissal of a criminal charge, the defendant had received a benefit "for her plea adequate to permit the trial court to conclude that her plea did not constitute a significant mitigating factor." *Id.* at 1164. Sherley faced prosecution and possible conviction and sentencing on two offenses: murder and conspiracy to commit murder. By accepting the plea agreement and pleading guilty to the conspiracy offense, she no longer faced possible conviction for murder and a sentencing range from 45 to 65 years. *See* I.C. § 35-50-2-3. Therefore, the trial court did not abuse its

discretion when it declined to find that her guilty plea was a significant mitigating factor. *See Id.*

Sherley cites to *Antrim v. State*, 745 N.E.2d 246 (Ind. Ct. App. 2001), for the proposition that the trial court abused its discretion when it failed to consider as a mitigating factor that her lengthy "incarceration would result in a hardship to her children." Sherley's Br. at 11. Antrim testified that his wife had cerebral palsy and was disabled; he was supporting three children; and he had held his job for ten years. We found these facts to support his "proffered mitigating factor of undue hardship." 745 N.E.2d at 248 (emphasis added). Here, the record established that Sherley's children were in the care of her mother; no evidence indicated that her mother was unable to care for them; and the PSI indicates that the twin sons were "potentially . . . going to be turned over to the custody of their father." (PSI at 5). Moreover, the minimum possible sentence for Sherley was twenty years. *See* I.C. § 35-5-2-4 (class A felony sentencing range from 20 to 50 years). Even if Sherley had been sentenced to serve the minimum twenty-year term, her children would have to grow up without her support and care. Therefore, we do not find that the trial court abused its discretion in not finding, as a mitigating factor, that the sentence imposed would result in undue hardship on Sherley's children. *See Firestone v. State*, 774 N.E.2d 109, 115 (Ind. Ct. App. 2002) (no abuse of discretion to not find hardship to children a mitigating factor when minimum statutory sentence twenty years).

Sherley also argues that the trial court abused its discretion when it found to be aggravating factors (1) Robinson's pregnancy, and (2) the cold-blooded and cruel nature of Robinson's murder. Again, we cannot agree.

Sherley acknowledges that we have held that pregnancy was a valid aggravating circumstance "when the defendant's actions foreseeably caused a level of devastation not typically associated with the offense," *Sipple v. State*, 788 N.E.2d 473, 480 (Ind. Ct. App. 2003), such as the loss to a family "not only [of the victim] but also her unborn child." Nevertheless, she argues that Robinson's pregnancy cannot be a valid aggravator here because the record "is devoid of evidence that [she] was aware of [Robinson's] pregnancy." (Sherley's Br. at 12). However, in *McCann v. State*, 749 N.E.2d 1116, 1120 (Ind. 2001), our Supreme Court held that the defendant's knowledge of the victim's pregnancy "is not necessary" for that fact to qualify as a valid aggravating circumstance in sentencing.[2] Because "aggravating circumstances turn on the consequences to the victim," *id.*, and Robinson's survivors sustained the loss not only of Robinson but also of Robinson's unborn child, the trial court did not err in finding her pregnancy to be an aggravating circumstance.

Sherley argues that the trial court improperly "use[d] a factor constituting a material element of [the] offense as an aggravating factor," Sherley's Br. at 13, when it found that the murder was "particularly cold-blooded and cruel." (App. 15). She further

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[2] We also note that Sherley's Appendix contains the May 10, 2007, supplemental notice by the State of its discovery compliance – which included a four-page Department of Child Services Report. That report reflects that at an interview on February 21, 2007, "[Sherley] said that Ashley was 3 months pregnant" when she had last seen her. (App. 118).

argues in this regard that it was Skinner who shot Robinson, and that she was neither present nor knew "how the murder was to occur." Sherley's Br. at 14.

The entirety of the trial court's statement in its finding of this aggravating factor is as follows:

> The conspiracy to which Ms. Sherley pled guilty resulted in a particularly cold-blooded and cruel murder. Ms. Sherley actively participated in luring Ashley Robinson to a place where others lay in wait to kill her. Mr. Skinner shot Ms. Robinson once in the face at close range, then fired a second shot into her body at close range. Ashley Robinson's body was then dumped into the Ohio River.

(App. 15). Thus, the trial court's finding included significant focus on Sherley's role.

In *Haas v. State*, 849 N.E.2d 550, 552 (Ind. 2006), the defendant admitted having "staked out the residence and [that he] knew a weapon was being brought by a co-conspirator." In the resulting robbery, the two residents were beaten by that weapon – a pipe. The trial court found as an aggravating factor "the heinous 'nature and circumstances of the crime.'" *Id.* at 553. Our Supreme Court explained that a proper aggravating circumstance as to "the nature and circumstances of the crime" was one where the facts of the offense were "especially repugnant," so as to warrant an enhanced sentence. *Id.* at 555. It noted that the facts admitted by Haas "support an aggravator meant to describe their moral and penal weight." *Id.* It then affirmed the trial court's finding of the aggravating factor.

Sherley testified repeatedly about her close friendship with and love for Robinson. However, she also admitted that it was her presence that resulted in Robinson's agreement to join her and Miller in the car. Further, Sherley admitted being with

Robinson for a considerable period of time that evening, yet making no effort to warn her. She admitted driving past places where she could have sought help, yet failed to do so. She admitted being in the presence of others at Wal-Mart, yet taking no action to ask for help. She admitted that after the Wal-Mart stop, she believed her car was nearly out of gas; but, rather than use that as an excuse not to take Robinson to the agreed site, she retrieved Miller's car. Sherley admitted that once they arrived at the river area in Miller's car, she did not warn Robinson to run away. Robinson was then shot to death, and her body was dumped in the river by Sherley's co-conspirators. These facts establish the particular repugnancy of the crime committed by Sherley. Therefore, the trial court did not abuse its discretion when it found the nature and circumstances of Sherley's crime to be an aggravating circumstance.

2. Restitution Order

Finally, Sherley argues that the trial court abused its discretion "when it imposed restitution in the amount of $18,175.30 without making an inquiry into [her] ability to pay and without fixing the manner of performance." Sherley's Br. at 14. We disagree.

As she correctly notes, Indiana Code section 35-38-2-2.3(a)(5) authorizes the trial court to order that "as a condition of probation," the defendant shall

> [m]ake restitution or reparation to the victim of the crime for damage or injury that was sustained by the victim. When restitution or reparation is a condition of probation, the court shall fix the amount, which may not exceed an amount the person can or will be able to pay, and shall fix the manner of performance.

However, although the trial court's order specified a number of conditions that applied during Sherley's probation, the order that she pay restitution was not one of them.

Indiana Code section 35-50-5-3(a) authorizes the trial court to impose "in addition to any sentence imposed" an order that the defendant "make restitution to the victim of the crime, the victim's estate, or the family of a victim who is deceased." I.C. § 35-50-5-3(a). Such a restitution order "is a judgment lien," and like "a judgment lien created in a civil proceeding." I.C. § 35-50-5-3(b).

Whether to impose such a restitution order, one that is not a condition of probation and does not contemplate imprisonment for failure to comply therewith during the probationary term, is a matter of trial court discretion, and we reverse only for an abuse of that discretion. *Little v. State*, 839 N.E.2d 807, 809 (Ind. Ct. App. 2006). An abuse of discretion has occurred only if no evidence or reasonable inferences therefrom support the trial court's decision." *Id.* Sherley does not challenge the amount of restitution ordered by the trial court. The order does not hold Sherley solely liable for restitution to Robinson's family; rather, it decreed that restitution would "be a joint and several obligation" of Sherley and her four co-conspirators. (App. 17). We find no abuse of discretion here.

Affirmed.

NAJAM, J., and BROWN, J., concur.